IN THE

Supreme Court of the United States

No. 78-1548
October Term, 1979

CALIFORNIA BREWERS ASSOCIATION, *et al.*,

Petitioners,

vs.

ABRAM BRYANT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply Brief of Petitioners California Brewers Association and California Breweries.

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Introduction.

Although the concept of the seniority system is difficult to define with precision, the parties and their amici reached consensus on a surprisingly large number of issues.

First, all parties and amici would extend Section 703(h) immunity to "ground rules" governing the application of seniority. Respondent defines such ground rules in vague terms: "Rules that define seniority and how it is calculated (including the unit in which it accrues, how it can be lost, etc.) or which affirmatively state to which decisions it applies, should be

considered parts of the system." Respondent's Brief, p. 8.[1]

Although the employers have avoided the dubious attempt to forge a highly imprecise term into an inflexible definition, Respondent's approach is easily reconciled with the employers' previous enumeration of the different types of seniority ground rules.

> "The standard of 'time served' or 'seniority' may involve any or all of the following:
>
> "(1) There may be rules on how 'seniority' or 'time served' is accumulated. In this context, the standards usually attempt to define what kinds of time count for purposes of accumulating seniority. . . .
>
> "(2) There may be rules on how accumulated seniority is lost. . . .
>
> "(3) There may be rules on how accumulated seniority is reinstated or regained. . . .

[1]Respondent made several attempts to define his concept of a seniority system:

> "By focusing on length of service as an essential element of seniority, we do not mean to imply that that element, standing alone, constitutes the definition of a 'seniority system', only that any definition of seniority system must, at a minimum, contain that element."
>
> Respondent's Brief, p. 20, n.9
>
> "*A seniority system consists of the rules and procedures which define seniority and its methods of calculation, along with those which affirmatively state the business decisions to which the seniority principle applies. Rules and procedures which limit the application of the seniority principle by excluding some employees from seniority protection or by asserting the application of non-seniority principles to personnel decisions are outside the system.* Provisions 'which define seniority and its methods of calculation' include those that specify the unit in which seniority is acquired and the situations in which it is lost or regained." [Emphasis original]
>
> Respondent's Brief, p. 33

> "(4) There may be rules on how accumulated seniority is transferred, as when an employee transfers from one department or plant to another. . . .
>
> "(5) Finally, there may be rules on how accumulated seniority is applied to particular employment decisions. These rules might involve the types of employment decisions and job benefits that are governed by the seniority principle. . . . The rules might also dictate the manner in which seniority is applied in combination with other standards such as a supervisor's evaluation, a productivity standard, or any number of other possible factors. . . ."
>
> Brief of Petitioners, California Brewers Association and California Brewers, 26-27

Second, all parties understand that principles governing the operation of seniority interact with other provisions in collective bargaining agreements. Moreover, even Respondent concedes that in analyzing this interaction, the seniority system must be analyzed as an integrated whole:

> "Certainly the congressional intent to let *bona fide* operation of the seniority principle stand, despite temporary perpetuation of some legacies of past discrimination, would be frustrated if 'seniority system' were construed as narrowly as Defendants claim the Ninth Circuit construed it. If each contractual provision could be examined separately according to the criterion of whether it, by itself, grants preferences that accumulate over time, then the narrow § 703(h) exemption would have little meaning at all, because most basic rules governing *application* of the seniority principle would be excluded." [Emphasis original]
>
> Respondent's Brief, pp. 30-31

Third, none of the parties seeks to unravel or circumvent basic principles of Title VII, such as the lessons of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Contrary to the assertions of Respondent and his amici, the employers have never contended that academic requirements, tests, supervisors' evaluations, experience tests or other devices completely unrelated to seniority standards should be immune under the seniority provisions of Section 703(h). To be sure, rules which "mix" seniority and non-seniority factors and which limit the weight of seniority must be viewed as part of the seniority system. For instance, many layoff procedures are based on numerical ratings that assign points for time served and points for ability as evaluated by a supervisor. The provisions that govern the measurement and calculations of seniority *and* which assign weight to the seniority factor must be immunized if Section 703(h) is to have any meaning at all. However, to the extent that the operation of an ability evaluation system can be analyzed separately, the seniority provisions of Section 703(h) have no applicability or relevance.

In light of this unexpected consensus it may be easier to resolve the remaining issues respecting the brewery seniority system. The 45-week requirement falls squarely within any reasonable definition of "seniority ground rules". The rule is a measure of time served.[2]

[2]The Brief for the United States challenges the idea that a rule governing the acquisition of job rights is a "seniority" rule because it is some measure of time served. More specifically, the Government offers the following critique of the 45-week requirement: "By requiring that the time served be within a given period of time, the vice in both instances is that no credit is given for the employee's previous or cumulative service." Brief of the United States, p. 25.

However, the Government does not adhere to the critique faithfully. First, the Brief concedes that probationary periods or separate seniority tiers are permissible: "A seniority system may provide for the acquisition of rights in stages, defined by minimum periods of service . . . so long as the acquisition of these rights is based primarily on cumulative length of service. . . ." *Id.*, p. 27, n.20. Thus, if the 45-week requirement was not tied to a restriction that the period must be completed in one year, it would be a seniority system.

Even this admission is not the whole story of the Government's position, since the Brief also admits that a seniority system may give "reasonable recognition to continuity of satisfactory service." *Id.*, p. 36.

In reality, therefore, the Government would permit the definition of the seniority system to depend on a court's second-guessing the reasonableness of specific contractual provisions. Thus, 45 weeks is a seniority provision. However, 45 weeks in one year is not. Forty-five *days* in one year or 45 weeks in two years may or may not be a seniority provision depending on a particular court's view of "reasonable recognition to continuity of service." This is precisely the type of judicial interference with collective bargaining that federal labor law has attempted to minimize.

It is a rule which governs the application, acquisition and maturation of seniority rights.[3] It is one of many rules in the contract that advantage incumbents over non-incumbents. In short, although Respondent protests that, standing alone, the rule does not result in an "ordinal ranking of employees" based on "an objective, non-manipulatable standard" (Respondent's Brief, p. 15), it cannot be denied that it does so when viewed in the context of other contract provisions.

[3]Respondents and their amici rely on *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, *on rehearing*, 583 F.2d 132 (5th Cir. 1978), for the proposition that a trial court may subject individual elements of a seniority system to independent examination to determine in appropriate instances that an element is not part of a seniority system. The employers contend that the *Parson* holding on this issue is erroneous, for the same reasons that the Ninth Circuit erred in the case at bar.

Moreover, *Parson* was decided after the development of a full factual record which included substantial evidence that the seniority system in that case was not bona fide.

Finally, respondent does not squarely confront the employers' contention that the Ninth Circuit erred by summarily deciding the seniority issue without affording the employers an opportunity to introduce evidence concerning the history, operation and purposes of the brewery industry seniority system. The Court of Appeals rendered its opinion prior to the development of any record, except the collective bargaining agreement itself. Moreover, the holding of the appellate court purports to foreclose further litigation of whether the 45-week requirement is part of the brewery seniority system. For this reason alone, the Opinion of the Ninth Circuit must be reversed.

I.

Realistic Judicial Standards Immunizing the Basic, Customary "Ground Rules" of Seniority Do Not Require Immunization of Non-Seniority Classification Devices.

The employers do not contend that Section 703(h) should be allowed to protect tests and academic requirements and similar classification devices. The employers argue only for a realistic approach, based upon recognition of the fact that each seniority system is unique and the product of negotiation and compromise in a specific industrial context.

A seniority system is a set of rules that creates differing degrees of preferential rights among employees based upon a standard of time served. Such rights may involve "competitive status" seniority or "benefit" seniority. *Humphrey v. Moore*, 375 U.S. 335, 346-347 (1964). Congress has chosen not to define the parameters of that term because national labor policy

leaves to management and labor the freedom and flexibility to articulate individual systems crafted to specific industrial settings. Indeed, this Court has repeatedly chosen to preserve the integrity of seniority systems and to create remedies for employment discrimination without dissecting and dismantling collectively-bargained systems. *See Franks v. Bowman*, 424 U.S. 747 (1976).

Seniority cannot be defined by cataloguing and categorizing the myriad of different features that might appear through negotiation and compromise in seniority systems. It is best understood and analyzed by reference to its purpose: to advantage incumbents over non-incumbents. Boiled to essentials, this is all any seniority system is designed to achieve. It is a prescribed reward for the investment of time served. Whatever job benefit is allocated by seniority, it can only be obtained by accumulation of working time.

The first step of a realistic approach is to ascertain whether the seniority principle operates in a specific collective bargaining agreement: whether incumbents are advantaged; whether certain job benefits are obtained or increased by working.[4] Then, as a second step

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[4]The Government misunderstands the brewery system's relationship to cumulative length of service. In one of many "improbable" hypotheticals, the Government posits the existence of: Employee A, who works 46 weeks in 1960 and two weeks per year thereafter; Employee B, who works 44 weeks per year since 1965; and Employee C, who works 46 weeks in 1976. Obviously, this hypothetical fails to account for many other factors, not the least of which is the multi-employer bargaining unit: no one attacks industry-wide seniority, and its inevitable consequence that employees at busy plants will accumulate seniority faster than employees at less prosperous breweries.

(This footnote is continued on next page)

the Court must examine the complexities and mechanics of the operation of the seniority principle. In this process, all seniority provisions must be scrutinized as an integrated whole. The final step of a realistic approach is to scrutinize the entire seniority system against the familiar and customary patterns of "ground rules" in other seniority systems. As noted above, all parties seem to agree on the necessity of this effort.

Nevertheless, the Ninth Circuit did not look at the specific way that the seniority principle operates in the brewery contract. Respondent's Brief, pp. 3, 28-29. Instead, the Ninth Circuit offered only theories regarding potential manipulation and, to borrow Respondent's phrase, "a few sentences near the end of the opinion" asserting in a most conclusory fashion that the 45-week requirement is not part of the brewery seniority system. Respondent's Brief, p. 29.

Nothing in the suggested approach is excessively broad. Judicial scrutiny of an entire seniority system against the patterns of existing seniority systems throughout American industry does not require the overruling of *Griggs v. Duke Power Co.* or any other

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However, the lesson of the hypothetical is its unreality. There is simply no way that Employee C could work the 46 weeks at the same employer without an able and available Employee B also crossing the 45-week threshold. There is no reasonable chance that employees will act like Employee A, losing ground in the seniority race by working only two weeks per year.

A truly realistic model for evaluating the brewery system will compare employees equally willing to work at equally busy employers. In such a model, job benefits will increase according to cumulative length of service, and length of service will be a function of job assignments, employees' willingness to work, and an employer's business—just like any other seniority system.

well-developed principles of Title VII governing employment procedures that have a disparate impact against minorities or females. For example, a requirement that an employee have a degree or pass a test to be (i) hired, (ii) promoted, (iii) transferred between plants, departments, job classifications, or (iv) paid more is not a measure of time served, and it is not one of the patterns in seniority systems suggested as a basis for an approach to Section 703(h).

The most frequently discussed hypothetical in this case is as follows: If Temporary employees could become Permanent employees only by passing a test or attaining a degree, would this degree-test requirement be part of a seniority system? The answer is a flat no. In such a case, there would be two separate seniority systems (like separate departmental seniority systems), with job assignments and benefits distributed within each classification. In the instant case, however, the standards of time served in the form of plant and industry seniority govern throughout one integrated, tiered seniority system. An employee advances within the classifications and between classifications by working—and only by working. His rights and benefits increase according to time served, even if the "time served" is measured by a complex standard. In short, the 45-week requirement bears no resemblance to the types of classification devices appropriately subject to the standards of *Griggs v. Duke Power.*

II.

Respondent Underestimates the Utility of Judicial Standards Designed to Determine Whether a Seniority System Is Bona Fide or Whether There Is Disparate Treatment of Minority or Female Employees.

A substantial amount of the sound and fury directed against the employers' arguments derives from the fear that judicial standards designed to ascertain the bona fides of a seniority system will not suffice to close "a yawning gap in Title VII protection" that would supposedly be created by the employers' suggested approach. Respondent's Brief, p. 37. Respondent's fears are unwarranted for several reasons.

First, the disparate impact theory which Respondent wishes to invoke, despite *Teamsters v. United States,* 431 U.S. 324 (1977), serves also to reveal the genuine character of the 45-week provision as part of a seniority system.[5]

The operation of seniority appears to have two kinds of disparate impact. One kind of impact derives from contractually prescribed hurdles to the advantages of incumbency. These hurdles are different definitions of time served. As a result of these hurdles, younger, ethnically diverse groups of employees are more vulnerable to layoff and less secure in their jobs. This, of

[5]Respondent does not allege that the 45-week requirement had a disparate impact against Temporary minority employees as opposed to Temporary white employees. Respondent's Brief, p. 56. Respondent's disparate impact theories closely parallel the theory discussed by this Court in *Teamsters v. United States* respecting seniority systems that perpetuate the effects of past discrimination. *Teamsters vs. United States,* 431 U.S. at 349. Respondent challenges, in effect, a system because of its "allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been [employed] for the longest time", and who have thereby achieved Permanent status. *Id.*

course, was the situation in *Watkins v. United Steel Workers,* 516 F.2d 41 (5th Cir. 1975), in which younger employees, including all blacks who were hired after enactment of Title VII, were laid off as a result of declining business fortunes before the older all-white employees whose service extended farther into the past.

The second kind of impact challenged in some seniority systems derives from an employee's specific assignment or location in an employer's business—plus the specific configuration of options for transfer, promotions or progression. This location in a plant, department or job becomes the primary barrier to fulfillment of the employee's aspirations and the primary determinant of the value of the employee's seniority rights. This was the situation in *Teamsters v. United States.*

Strangely, this case appears to fall more clearly in the *Watkins*-type of seniority cases. Respondent alleges that declining business fortunes and technological changes made it difficult or impossible to become a Permanent employee, at least in Northern California. Thus, as in *Watkins,* the lack of permanent status—a form of seniority—combined with the declining business fortunes of the employers, aggravating the vulnerability of Temporary employees.

Nevertheless, it is the second line of seniority cases, including *Teamsters,* that demonstrates the misleading quality of the Ninth Circuit's pronouncement that length of service must play the dominant role in the determination of the allocation of job rights and benefits. In either case, careful examination reveals no real "gap" in Title VII's intended scope. Congress deliberately decided to limit its efforts to eradicate the injustice of employment discrimination by protecting the seniority rights of incumbents against all but the claims of

identifiable victims of discrimination. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). In sum, the alleged disparate impact caused by the 45-week requirement is equivalent to the advantage held by incumbents in any number of other seniority systems. Section 703(h) represents that advantage.

In this context, Respondent's fears are unwarranted for a second reason: the dangers alleged as inherent in the "yawning gap" are really forms of intentional discrimination. These dangers are the focus of (i) the "bona fide" limitation to Section 703(h), and (ii) the prohibitions against disparate treatment embodied in Title VII.[6]

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[6]Respondent and his amici adopt a definition of "seniority system" that would do great damage to existing patterns in American industry. Respondent's opinion of probationary periods is only one example.

However, this effort to rewrite customary concepts of seniority systems rests on hypotheticals, rather than any specific examples drawn from existing systems. The Brief for the United States contains the most obvious and representative examples. The Government analogizes the 45-week requirement to a hypothetical rule—which is admitted to be "improbable"—that "in order to become a permanent employee one must work seven days in one week—a rule that might well prevent an orthodox Sabbatarian from ever acquiring permanent status. . . ." Brief for the United States, pp. 24-25. Later, while purporting to discuss the problem of whether the definition of a seniority unit is part of the seniority system, the Government poses still another improbable hypothetical: "Suppose . . . that an agreement provides that the seniority of all company employees is based on length of service with their particular plant, except that the seniority of sons of employees is based on their company-wide seniority." Brief of United States, pp. 25-26, n. 19. Needless to say, there is no citation to any existing seniority provision that remotely resembles these two hypotheticals.

In any case, these assignments again reflect an unwarranted lack of confidence in other Title VII principles. The seniority system must be "bona fide." As noted by this Court in *Teamsters v. United States*, as a result of the "bona fide" limitation, a plaintiff must show the system either: (i) had its genesis in racial discrimination; (ii) does not apply in an even-handed manner to all races; (iii) is irrational; or (iv) has not been negotiated or maintained free from illegal purposes. 431 U.S. at 355-56.

The "rationality" component of this "bona fide" limitation could easily be applied against these "improbable" examples. Petitioners contend, in short, that a realistic approach to the definition of "seniority system" requires only an analysis of existing patterns in collective bargaining agreements; such an approach need not respond to every "improbable" hypothetical devised by the minds of lawyers and advocates.

Both the Ninth Circuit and the Respondent suggest a number of hypotheses regarding the ways in which the employer can keep the number of permanent employees artificially low, allegedly keeping a pool of temporary employees available to do similar work at lesser rates of pay.[7] These theories ignore the specificity and comprehensiveness of the brewery provisions, and the availability of Title VII principles that would remedy real abuses.[8] For instance, if Bry-

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[7]As Respondent concedes, this seniority system governs a seasonal business. When the employees do not work beyond the season, or when they work only when available work opportunities are much higher than normal, they do not become "Permanent." The fact that the seasonal employees do not become Permanent employees until they have worked beyond the season in a given year does not mean that the rules relating to the seasonal and Permanent employees are not part of the seniority system.

[8]The Respondent asserts untenable, conjectural allegations of potential abuse due to the 45-week requirement (Respondent's Brief, p. 22). He suggests:

> "The shifting of production from one plant to another, the occurence (sic) of illness or injury, the particular timing of a layoff or a transfer or a re-assignment—any of these serves to halt an imminent promotion."
> Respondent's Brief, p. 22

Respondent admits that these risks are not unknown to "true" seniority systems. More accurately, such risks invariably exist in any seniority system. The occurrence of illness and injury is a totally personal matter which often prevents maturation of seniority, or even causes loss of seniority: it is hard to see how it could constitute race or sex discrimination. Transfer or reassignment would not interfere with seniority rights since service in the industry is the critical standard: after the transfer, service still counts toward the 45 weeks.

ant is right and he did not receive a job assignment while two lesser senior white employees were dispatched in his place, Respondent has alleged not only a breach of the collective bargaining agreement, but also a form of disparate treatment prohibited by Title VII. Nothing the employers have suggested about the scope of Section 703(h) immunity would limit the Respondent's right to recover if such allegations of intentional discrimination were proved.

Respondent also appears to misconceive the purpose and role of probationary periods. Generally, an employee serves during an initial period of time in a probationary status. The functions of the probationary period are usually limited to the following consequences: (i) The probationary employee is more susceptible to layoff if there is a reduction in the work force; (ii) A probationary employee usually has no recourse to contractual remedies, grievance procedures, or "just cause" limitations against discharge and discipline; (iii) A probationary employee usually receives less benefits than a non-probationary employee. Respondent's insinuation that probationary requirements "could . . . face a Title VII challenge if it somehow operated to discriminate against minorities" (Respondent's Brief, p. 34) seems to hint that the scope of Section 703(h) immunity ought to be governed by the potential for abuse in discipline of minority probationary employees. If a discharged probationary employee alleges that he was fired more quickly, or was judged by standards more harshly than a similarly situated white employee, he has alleged classic disparate treatment. If there is an allegation that the company has hired minorities with the intent to "weed them out" during the probationary period, thus artificially inflating the number of

minority hires while keeping the actual composition of the work force predominately white, Plaintiffs would still have real and provable allegations of disparate treatment. In that case, the process of discipline, not the probationary period, would be the focus of Plaintiff's challenge. There is simply no need to restrict the employer's ability to use a probationary period properly because of some misconceived feeling that the period might be abused in a manner that could escape scrutiny and remedy under Title VII.

In sum, the seniority protections of Section 703(h) should not be circumvented or eroded because of an unwarranted lack of confidence in the other legal principles embodied in Title VII. Potential abuses of disciplinary power, tests, performance evaluations and the like do not warrant the slow undoing of seniority systems. After all, to attain job benefits in a seniority system, an employee needs only to accumulate working time.[9] In such circumstances, the only obstacles to

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[9]The Government would limit Section 703(h) protection to systems that allocate job benefits according to cumulative length of service, thereby assuring that rights increase over time with "reasonable certainty." Brief of United States, pp. 29 *et seq.*

However, when put to the test of demonstrating why the 45-week requirement does not increase job rights with "reasonable certainty," the Government cites "fortuities" that would bar seniority accumulation in *any* system.

> "[T]he 45-week rule in this case and related provisions in the agreement provide no reasonable certainty that the benefit (permanent status) will accrue fairly automatically with increased length of service; instead it depends mainly on the discretion of the employer (in deciding when and how many employees to lay off each year) or other fortuities (*e.g.*, seasonal fluctuations in business or bumping by permanent employees)."
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> Brief of United States, p. 30.

The Government seems to be saying that if an employer reduces the work force or responds to fluctuations in business—as

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minorities building up working time would be either derogations of the seniority principle or techniques of intentional discrimination for which the law has ample and effective remedies.

Conclusion.

Despite the unavoidable difficulties in developing an adequate definition of seniority systems that would accommodate and cover the many different types of systems now operating throughout the country, the unexpected consensus between the parties and their amici underscores the fact that there is a body of law, lore and experience in American industry that gives meaning and reality to the term "seniority system." Judicial scrutiny of the operation of seniority in a particular case will necessarily require reference to this

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any employer must do—this fact will affect whether a negotiated seniority system for layoffs will be entitled to Section 703(h) immunity! Evidently, if the employer acts only as a result of "incapacitating events beyond anyone's control," *id.*, p. 31, there is a "reasonable certainty" and, therefore, a seniority system. If the employer is merely acting in its "discretion," there is no reasonable certainty and, thus, no seniority system. Needless to say, the Government overlooks the fact that expectations premised on seniority systems are always dependent on the health of the employer's business. As Professor Benjamin Aaron noted in his widely-cited commentary "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv. L. Rev. 1532, "Seniority is a system of beneficial employment preferences; it is absolutely dependent upon the existence of an employment relationship." 75 Harv. L. Rev. at 1540. By this analysis, any legitimate interruption in the employment relationship—whether by business "fortuities" or even an employer's decision to move a plant—can interfere with or even destroy seniority rights.

The fact that these business "fortuities" are the only routine obstacles to enhancement of job rights demonstrates that the brewery system is, indeed, a seniority system.

body of law and information. The one indisputable, and undisputed, principle is that all of the ground rules of seniority must be examined and judged as an integrated whole.

In summary, this collective bargaining agreement contains an integrated, tiered seniority system; and the 45-week requirement is an integral component of the system. However, even if it is premature for this Court to undertake the suggested analysis at this particular stage of this litigation, there is no doubt that the Ninth Circuit failed to adopt a realistic approach to the scrutiny of seniority systems. As a result, the Court of Appeals rendered a premature, erroneous judgment on the character and scope of the brewery seniority system. This judgment should be vacated.

Respectfully submitted,

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